Supreme Court, U.S.
FILED
MAY 31 1996

(4)

No. 95-897

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANCES BERNARD AUER, ET AL., PETITIONERS

v.

DONALD A. ROBBINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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24 pp

QUESTIONS PRESENTED

Regulations promulgated by the Secretary of Labor provide that employees are considered to be paid on a "salary basis," and therefore may be "executive," "administrative," or "professional" employees exempt from the overtime requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, if they are paid a predetermined amount, on a weekly or less frequent basis, that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). In addition, 29 C.F.R. 541.118(a)(6) provides a "window of correction" under which an employer that has made a deduction from an employee's pay that would remove the employee from salary basis status for FLSA purposes may retroactively restore the employee's exempt status by reimbursing the employee and promising to comply with the salary basis rule in the future. The questions presented are:

1. Whether petitioners' pay is "subject to" reduction within the meaning of 29 C.F.R. 541.118(a), when respondents have a policy that permits disciplinary suspensions of less than one week, but the policy has been implemented only once under unique circumstances.

2. Whether an employer that has a policy that permits disciplinary suspensions may take advantage of the window of correction to remedy a one-time disciplinary deduction that occurred under unique circumstances.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the requirement of overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are

defined and delimited from time to time by regulations of the Secretary [of Labor])."

Regulations promulgated by the Secretary provide that, in order to qualify for professional, executive or administrative status, an employee must meet both a salary basis and a duties test. See 29 C.F.R. 541.1 (executive), 541.2 (administrative), 541.3 (professional). This case concerns only the salary basis test.

Under the salary basis test, an employee generally does not qualify as a bona fide executive, administrative, or professional employee if the employee is paid hourly or piecework wages rather than a salary. 29 C.F.R. 541.1(f) (bona fide executive employee must be "compensated for * * * services on a salary basis" at no less than a specified rate); *id.* at 541.2(e)(1) (same for administrative employee); *id.* at 541.3(e) (same for professional employee). An employee is considered to be paid on a salary basis if the employee "regularly receives * * * a predetermined amount" of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As a general rule, a "salary basis" employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Ibid.*

The regulations provide exceptions to that rule. One exception is that an employer may impose penalties for infractions of safety rules of major significance without affecting an employee's salaried status. 29 C.F.R. 541.118(a)(5). Suspensions for infractions of work rules that are not major safety rules, however, are governed by the general salary basis test set forth in 29 C.F.R. 541.118(a). Thus, an

employee suspended without pay for less than one week for a violation of a rule that is not a major safety rule would ordinarily be classified as unsalaried. On the other hand, an otherwise salaried employee who is suspended without pay for one week for the violation of such a rule would remain a salaried employee.[1]

The regulations further provide, in a subsection commonly referred to as the "window of correction," that an employer who has made a deduction that runs afoul of the salary basis rule may take corrective action to restore retroactively the employee's exempt status. The "window of correction" regulation states in pertinent part:

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In

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[1] In addition to permitting unpaid disciplinary suspensions as penalties for violations of major safety rules, the salary basis regulation permits deductions from a salaried employee's compensation to reflect absences of "a day or more" for personal reasons other than sickness and accident (29 C.F.R. 541.118(a)(2)) and to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability" (*id.* at 541.118(a)(3)). The regulation does not permit docking an employee's pay for partial day absences. In August 1992, however, the Secretary promulgated a special rule for state and local government employees that permits public employees who otherwise meet the salary basis test to be subject to deductions for partial-day absences "according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability." 29 C.F.R. 541.5d. That regulation does not alter the treatment of disciplinary deductions for public employees.

> such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. 541.118(a)(6).

2. Petitioners are a group of police sergeants and one police lieutenant employed by the St. Louis Police Department. Pet. App. 6a, 36a. During the pertinent time frame, state law has provided that St. Louis police sergeants receive a yearly salary and has specified that officers at the rank of sergeant or higher are allowed no overtime pay. *Id.* at 6a & n.1, 43a-46a.

The St. Louis Board of Police Commissioners has issued a Police Manual that specifies standards of conduct by which police officers must abide. Pet. App. 102a, 107a-117a. The penalties for violating some of those standards include disciplinary suspensions without pay. See, *e.g.*, *id.* at 148a, top of col. 3 (penalty for first offense of "failing to properly patrol assigned beat" is "[r]eprimand to 5 days"). The St. Louis Police Department has imposed a disciplinary suspension without pay on a sergeant, however, in only one instance. In 1990, two years after this lawsuit was filed, the police department charged a sergeant with violation of the city residency requirement and recommended that he be dismissed. *Id.* at 10a. Under an agreement with the city, the sergeant waived his right to a hearing and accepted, in lieu of dismissal, a

two-day suspension without pay. *Ibid.* In 1991, the department changed its policy to provide that termination is the exclusive sanction for violation of the residency requirement. *Ibid.*

3. Petitioners brought this action in 1988 against respondents, the members of the St. Louis Board of Police Commissioners, alleging that respondents denied them overtime compensation in violation of the FLSA. Pet. App. 6a, 36a-37a. Respondents asserted that petitioners were administrative or executive employees within the meaning of Section 13(a)(1) and therefore exempt from the FLSA's overtime requirements. *Ibid.*

On cross motions for partial summary judgment, the district court ruled that the lieutenant petitioner performed primarily management duties, that lieutenants and sergeants were salaried rather than hourly employees, and that there were genuine issues of disputed fact as to whether sergeants met the duties component of the test for executive or administrative employees. Pet. App. 6a-7a, 71a-74a. The court therefore held that the lieutenant petitioner was exempt under Section 13(a)(1), Pet. App. 74a, and that the case should proceed to trial on the question whether the sergeants satisfied the duties component of the test for executive or administrative employees. After trial, the district court ruled that twenty categories of sergeants were exempt under Section 13(a)(1) and that two categories of sergeants were partially exempt. Pet. App. 6a-7a, 47a-62a, 64a-65a.

4. The court of appeals affirmed in part and reversed in part, holding that all categories of sergeants were exempt under Section 13(a)(1). Pet. App. 1a-35a. The court rejected petitioners' argument that they were not paid on a "salary basis" within the

meaning of the Secretary's regulations because respondents' disciplinary policy authorizes less than one-week suspensions without pay for violations of rules that are not safety rules of major significance. The court held that, under Eighth Circuit precedent, "[t]he mere possibility of an improper deduction" from pay does not defeat an employee's salaried status under the Secretary's regulations. *Id.* at 8a (citing *McDonnell* v. *City of Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), cert. denied, 114 S. Ct. 1188 (1994)).

The court of appeals also rejected petitioners' contention that they were not exempt employees because respondents had suspended one sergeant for two days without pay for violating a residency requirement. Because a residency requirement is not a safety rule of major significance, the court concluded that the sergeant's two-day suspension without pay was inconsistent with the Secretary's salary basis regulation and "arguably" required that the sergeant be treated as a nonsalaried employee. Pet. App. 9a. The court concluded, however, that such a one-time improper deduction did not mean that *all* sergeants should be considered nonsalaried. *Ibid.*

The court concluded that the "window of correction" regulation permits an employer who makes an improper deduction in an employee's salary to retain the exemption when the improper deduction is a "'*one-time* or unintentional failure to adhere to § 541.118(a)'s requirements.'" Pet. App. 9a (quoting *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992)). The court determined that, although the window is not available when an employer has a settled policy of making improper deductions from compensation, the sergeant's disciplinary loss of pay in this case had not

been made pursuant to an established policy. Pet. App. 9a-10a & n.7. The court explained that the sergeant initially faced the penalty of termination, which would not have altered his exempt salaried status, and that respondents agreed to the lesser penalty of suspension as part of an agreement in which the sergeant waived his right to a hearing. *Id.* at 10a. The court also noted that respondents had changed their policy to make termination the exclusive penalty for violations of the residency requirement, so that respondents in the future would not impose pay deductions as a penalty for violation of the rule. The court concluded that, in those circumstances, the regulations "simply require the employer to reimburse the employee for the lost wages." *Ibid.*[2]

DISCUSSION

The decision of the court of appeals is correct. Although the courts of appeals are not in full agreement on the correct interpretation of the salary basis regulations, this case does not warrant review. The facts of the case are unusual; the disagreement among the circuits is not as pronounced as petitioners suggest; and the position articulated by the Secretary in this case may eliminate uncertainty in the lower

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[2] The court of appeals also held that all of the sergeants performed primarily administrative or managerial duties, thereby satisfying the duties component of the Section 13(a)(1) exemption. Pet. App. 10a-35a. Petitioners have not sought review of that ruling. In addition, because the court held that petitioners were exempt salaried employees within the meaning of the Secretary's regulations, the court did not address the question whether the Secretary's salary basis test is valid as applied to public employers. *Id.* at 8a n.6

courts and thereby obviate any need for this Court's intervention.

1. Petitioners' first question presented (Pet. i, 11-12) is whether the Department of Labor's salary basis test for determining whether an employee is exempt from the FLSA's overtime requirements applies to state and local government employees. The court of appeals, however, did not resolve that question. Instead, it "assume[d], without deciding, that the regulation validly applies to public sector employees," Pet. App. 8a n.6, and that assumption was not adverse to petitioners. Petitioners' first question is therefore not properly presented in this case.[3]

2. Petitioners' second question (Pet. i, 14-15) seeks review of the court of appeals' holding that petitioners' salaried status is not affected by the fact that respondents' police manual permits disciplinary suspensions of less than one week for violations of rules that are not safety rules of major significance. That question does not warrant review.

a. The court of appeals correctly concluded that petitioners were salaried employees within the meaning of the Secretary's regulations. Petitioners were paid a predetermined amount every two weeks, and the district court found that there was no police department procedure for deducting pay from a

[3] For the reasons set forth in our brief in opposition to the petition for a writ of certiorari in *Wisconsin* v. *Mueller*, petition for cert. pending, No. 95-586, the disciplinary deduction component of the salary basis test at issue here is valid as applied to state and local employees, and there is no conflict in the circuits on that issue (A copy of that brief is being served on counsel of record in this case.). Thus, even if that question were properly presented in this case, review on that issue would not be warranted.

sergeant or higher-ranking officer on an hour-by-hour basis because that employee did not work a certain number of hours. Pet. App. 71a-72a.

Accordingly, the sole question is whether the discipline provisions in respondents' police manual have the effect of altering petitioners' salaried status. Under the Secretary's regulations, employees are generally considered unsalaried when their pay is "subject to reduction because of variations in the quality or quantity of the work performed," 29 C.F.R. 541.118(a), and that general rule applies when employees are "subject to" disciplinary suspensions of less than one week for violations of rules other than major safety rules. See *Shockley* v. *City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993) ("because an exception was necessary for safety rules of major significance, reductions made for infractions of other types of rules constitute reductions based on the quantity and quality of an employee's work") (collecting cases); *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993) ("[w]e may logically infer that infractions of safety rules of non-major, i.e. minor, significance are not permissible under the interpretations since penalties for infractions of safety rules of major significance are"). Petitioners contend that, because respondents' manual permits unpaid suspensions of less than one week for violations of rules other than major-safety rules, petitioners are "subject to" such suspensions and therefore unsalaried. Pet. 13-15.

Although petitioners' interpretation of the regulations is not implausible, the Secretary does not interpret the "subject to" language in that way. An employee who is otherwise paid on a salaried basis does not lose that status simply because he is *theoretically*

"subject to" an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. Rather, salaried status is lost under the regulations only when employees are "subject to" such a disciplinary suspension *as a practical matter*. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under unusual circumstances, employees who are not themselves suspended do not lose their salaried status. Among the factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions of less than one week, but who have not been so suspended, are: the number and type of employees covered by the policy, the number of instances of impermissible deductions, and the circumstances surrounding those deductions, *e.g.* whether they were idiosyncratic or reflected a more routine use of suspensions of less than one week. Like all exemptions in the FLSA, the employer has the burden of proving that the employees are paid on a salary basis: *e.g.* by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances. See *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 206 (1966).

Under the Secretary's reading of the regulations, the court of appeals correctly concluded that petitioners as a class were not subject to reduction in pay for disciplinary suspensions of less than one week for violations of rules that are not major-safety rules. While respondents' manual permits such suspensions for sergeants, only one such suspension has occurred

since 1978, Br. in Opp. 13, and that suspension occurred under "unique circumstances." Pet. App. 10a. In those circumstances, it would ignore the realities of respondents' compensation scheme to characterize petitioners as hourly-paid, rather than salaried, employees.

b. Petitioners contend (Pet. 13-14 & nn. 9-13, 1e-4e) that the decision below is consistent with decisions from the Fifth and Eleventh Circuits, see *York* v. *City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters* v. *City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991), but that it conflicts with decisions from the Second, Fourth, Sixth, Seventh, Ninth, and D.C. Circuits. See *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992); *Shockley* v. *City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1991); *Michigan Ass'n of Governmental Employees* v. *Michigan Dep't of Corrections*, 992 F.2d 82, 85-86 (6th Cir. 1993); *Bankston* v. *Illinois*, 60 F.3d 1249, 1253 n.1 (7th Cir. 1995); *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 286 (7th Cir. 1993); *Abshire* v. *County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991); *Hurley* v. *Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Kinney* v. *District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993). According to petitioners (Pet. 13-14), the latter cases hold that the mere existence of a personnel manual or comparable written document that authorizes deductions in pay is sufficient to show that a class of employees is "subject to" such deductions, even if that policy is never implemented.

The divergence among the circuits is neither as clear nor as pronounced as petitioners suggest. A number of the cases relied on by petitioners involved

the question of the effect on salaried status of manual provisions that *required* a deduction of pay for *partial day absences* if an employee had exhausted permissible leave.[4] They did not involve the very different question of the effect on salaried status of manual provisions covering *disciplinary* suspensions that *permit* (but do not require) suspensions without pay for violations of rules. Courts that have concluded that salaried status is defeated by a written policy that requires deductions from pay, regardless of the extent to which the policy has been applied, may not reach the same conclusion about a manual provision that merely permits, but does not require, deductions from pay. See *Barner* v. *City of Novato*, 17 F.3d 1256, 1262-1263 (9th Cir. 1994) (drawing a distinction between a policy that requires pay docking for partial day absences and a policy that permits, but does not require, pay docking for partial day absences).

Most of the cases cited by petitioners do not squarely conflict with the decision below for other reasons as well. For example, in *Michigan Association*, the Sixth Circuit held that the employees at issue were salaried because the portion of the employer's compensation manual concerning pay docking was ambiguous and the employer's actual practice demonstrated that the true nature of the policy was not to dock employees' pay for partial day absences. 992 F.2d at 86. The court's further statement that salaried status would have been defeated if the manual clearly required pay docking for partial

[4] Only *Shockley*, *Bankston*, *Klein*, and *Hurley* do not fall within that category.

day absences was therefore dicta.[5] The courts in *Malcolm Pirnie*, *Klein*, *Abshire*, and *Hurley* did not rely exclusively on the terms of the employers' written manuals or procedures concerning deductions in pay in concluding that the employees in those cases were not salaried. In *Malcolm Pirnie*, the court also cited evidence that the employer viewed its employees as hourly, that 24 employees had amounts deducted for partial day absences, and that the remaining employees were required to deduct from personal leave time or make up the hours they missed in order to avoid salary deductions. 949 F.2d at 617. In *Klein*, which did not involve a class of employees, the court also relied on the employer's overtime and compensatory time policy, and evidence that the particular nurse seeking overtime had been suspended without pay several times for disciplinary infractions. 990 F.2d at 284-287. In *Abshire*, the court also relied on the fact that the battalion chiefs in question were eligible for overtime pay and compensatory time. 908 F.2d at 486. And in *Hurley*, the court also relied on evidence that pay was reduced on at least eight occasions. 27 F.3d at 394.

In *Shockley*, the Fourth Circuit held that reductions in pay for non-safety related disciplinary purposes defeated salaried status. 997 F.2d at 24-25. The court did not discuss, however, whether such reductions had been made or whether the absence of such

[5] Furthermore, as noted above, cases such as *Michigan Association* involved a situation in which it was alleged that the employers' actual policy *required* reductions in pay for partial-day absences, not one that merely permitted reductions for disciplinary infractions.

reductions would have made a difference in its decision. *Ibid.*

Finally, in *Bankston*, although the Seventh Circuit stated that it is not necessary to show that a deduction actually has been made from an employee's salary, it did not hold that the mere existence of a manual provision that includes a suspension without pay of less than one week among a range of possible disciplinary actions removes all employees covered by the manual from salaried status as a matter of law. Rather, the court noted that a commanding officer of the state agency had "testified that officers of the plaintiff[s'] rank may be suspended without pay for violating any [agency] rule," that the agency defendants presented no evidence to contradict that testimony, and that it therefore was reasonable for the jury to conclude that plaintiffs were not exempt employees because they were subject to being docked for pay for reasons that would violate the no docking rule. 60 F.3d at 1253.

c. For the foregoing reasons, we do not believe that there has yet emerged a sharp conflict among the circuits warranting the Court's review regarding the application of the salary basis test under the Secretary's regulation in circumstances, such as those presented here, involving a written manual provision that permits disciplinary suspensions of less than one week but in which no actual policy of imposing such suspensions has been identified. Moreover, the cases upon which petitioners rely were all decided without the benefit of a clear statement by the Department of Labor on the correct reading of its regulations. With the guidance provided by the Department of Labor in

this case, the issue may well be resolved without the need for this Court's intervention.[6]

Under established principles of administrative deference, an agency's interpretation of its own regulations must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Accordingly, in future cases, the courts of appeals will be guided by the Secretary's interpretation in construing the applicable regulations. Because uncertainty over the meaning of the regulations may well dissipate, there is no need for intervention by this Court at this time. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

3. The third question on which petitioners seek review (Pet. i, 15-17) is whether the court of appeals was correct in holding that the "window of correction" was available to respondents in order to rectify the single improper deduction that respondents had taken from an employee's salary in this case. That question also does not warrant review.

a. Under the salary basis regulations, "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. 541.118(a)(6). In *Malcolm Pirnie*,

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[6] The Court has been "properly hesitant" to reject a federal agency's interpretation of its own regulations that is expressed for the first time in litigation involving other parties unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation. See *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988).

949 F.2d at 616, the Second Circuit interpreted that provision to "permit[] employers to treat otherwise eligible employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements." In 1991, the Department of Labor's Wage and Hour Division issued an opinion letter agreeing with the Second Circuit that an employer that has made a "one-time disciplinary deduction" would be eligible for the window of correction. *Salary Basis*, Wage & Hour Manual (BNA) 99:5257 (Dec. 24, 1991).

Because this case involves a "one time" deduction, the court of appeals correctly concluded that respondents could take advantage of the window of correction to restore the salaried status of the one sergeant who was disciplined without pay for violating respondents' residency requirement. As long as respondents reimburse the affected employee and promise to comply in the future, the sergeant who was disciplined would not be entitled to overtime pay.[7]

b. Petitioners argue (Pet. 16) that the decision below conflicts with *Malcolm Pirnie* and *Klein*. According to petitioners, those decisions hold that the window of correction is available only when no formal written policy provides for deductions. As noted above, however, *Malcolm Pirnie* interpreted the window of correction regulation to permit an employer to correct a "one-time" improper deduction despite the existence of a written policy. The employer in

[7] Because the employees other than the sergeant were not subject to disciplinary deductions in the first place, they would retain their status as salaried employees, regardless of whether respondents exercise their option to retroactively restore the salaried status of the sergeant who was suspended.

Malcolm Pirnie could not take advantage of that interpretation, because the employer had made deductions for partial days absences in a significant number of cases. 949 F.2d at 616-617. There is therefore no conflict between *Malcolm Pirnie* and the decision below. Similarly, the court in *Klein* held that the employer could not take advantage of the window of correction because the employer had suspended the employee involved in that case several times. 990 F.2d at 287. The court in *Klein* noted that other courts had concluded that the window could not be used when "the impermissible deductions were pursuant to an express policy and thus were not inadvertent." *Ibid.* The court did not have occasion to consider, however, whether an employer that has a written manual that permits disciplinary deductions could take advantage of the window of correction to remedy a one-time use of such a deduction.[8]

c. In any event, this case does not present an appropriate vehicle for resolving the question whether an employer may take advantage of the window of correction to remedy a one-time deduction that is made pursuant to a formal policy that permits disciplinary deductions. The court below concluded that the one-time disciplinary deduction at issue in this case was not made "pursuant to an established policy." Pet. App. 10a. Instead, the court concluded

[8] *Abshire* also does not squarely conflict with the decision below. In that case, the court concluded that the window of correction is "for an employer that makes a one-time improper deduction and then corrects its error." 908 F.2d at 489. The court also stated that the window is not available when an employer has adopted an express policy that conflicts with the salary basis rule and has continued to adhere to such a policy. *Ibid.*

that the deduction was made pursuant to a unique settlement in which respondents agreed not to fire the sergeant and the sergeant agreed to a two-day suspension without pay. The court's fact-bound conclusion that the deduction at issue in this case was not made pursuant to an established policy raises no issue of general importance and therefore does not warrant this Court's review.[9]

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[9] Petitioners complain (Pet. 17) that the court of appeals did not require reimbursement to the affected employee as a condition of dismissal of the suit. Respondents, however, unequivocally state in their response to the petition (Br. in Opp. 12) that they intend to reimburse the affected sergeant. It is therefore unnecessary for the Court to consider that issue. Petitioners also contend (Pet. 16-17) that the court of appeals should have required respondents to modify their entire disciplinary code, not just the portion dealing with the residency requirement. The court of appeals' resolution of that narrow question does not raise any issue of general importance and does not conflict with the decision of any other court of appeals. Review of that issue is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996